

-File

**BEFORE THE  
STATE OF WISCONSIN  
Division Of Hearings And Appeals**



---

Application of Shore Drive Partnership for a  
Permit to Place Two Piers on the Bed of Lake  
Beulah, Town of East Troy, Walworth County,  
Wisconsin

---

Case No. 3-SE-96-234

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER DENYING PERMIT**

Shore Drive Partnership, P. O. Box 1385, Waukesha, Wisconsin, 53187, applied to the Department of Natural Resources for a permit to place two piers on the bed of Lake Beulah. The purpose of the project is to provide public rental boat slips and mooring for customer boats. The project is located adjacent to the Dockside Restaurant at 912 East Shore Drive in the NE ¼ of the NE ¼ of Section 9, Township 4 North, Range 18 East, Town of East Troy, Walworth County, Wisconsin.

The Department of Natural Resources issued a Notice of Proposed Piers which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. Several timely objections were received.

On May 22, 1997, the Department forwarded the file to the Division of Hearings and Appeals for hearing.

Pursuant to due notice hearing was held on August 25, 1997, at Elkhorn, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ), presiding. The parties requested an opportunity to submit written briefs and the last brief was received on October 17, 1997.

In accordance with secs. 227.47 and 227.53(1)(a ), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Michael Lutz, Attorney  
P. O. Box 7921  
Madison, Wisconsin 53707-7921

Lake Beulah Management District, by

David M. Reddy, Attorney  
P. O. Box 318  
Elkhorn, Wisconsin 53121-0318

Shore Drive Partnership, by

Chris J. Trebatoski, Attorney  
Michael, Best & Friedrich  
100 East Wisconsin Avenue, Suite 3300  
Milwaukee, Wisconsin 53202

O-Ton-Kah Park Property Owners, by

Patrick J. Hudec, Attorney  
P. O. Box 167  
East Troy, Wisconsin 53120-0167

Lake Beulah Yacht Club, by

Robert Mueller  
N9124 Humphrey Lane  
East Troy, Wisconsin 53120

Lake Beulah Protective & Improvement Association, by

Raymond Olson, Jr.  
N9174 Oakwood  
Mukwonago, Wisconsin 53149

#### FINDINGS OF FACT

1. Shore Drive Partnership (the applicant or the Partnership), P. O. Box 188, Mukwonago, Wisconsin 53149, completed filing an application with the Department for a permit under sec. 30.12, Stats., to place piers on the bed of Lake Beulah, Town of East Troy, Waukesha

County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicant owns real property located in the NE ¼, NE ¼ of Section 9, Township 4 North, Range 18 East, Walworth County. The above-described property abuts Lake Beulah which is navigable in fact at the project site.

3. The applicant proposes to construct two 140 foot-long piers, capable of mooring 30 boats, near the Dockside Bar and Restaurant (Dockside). The Dockside property consists of two parcels, a 32 foot-wide parcel on the north and an 80 foot parcel on the south. (Ex. 26) The north pier would accommodate 16 boats, 12 to be made available for seasonal public rental and 4 for use by transient Lake Beulah users. The south, "shared" pier would accommodate 14 boats; 5 reserved for O-Ton-Kah Subdivision residents and 9 made available for transient use. The plan also allows for provision of a roped swimming area between the two proposed piers.

The south parcel is an area over which O-Ton-Kah shares rights that were reserved in a 1939 Warranty Deed from their predecessors in title to Dockside's predecessor in title. The deed was recorded March 23, 1939. (Ex. 12) The relevant portion of the Deed states:

The parties of the first part reserve for themselves, their heirs and assigns and the owners in O-Ton-Kah Subdivision and any others along the channel, the use of the channel as a means of ingress and egress, and also reserving for themselves and such owners, the right in common with the parties of the second part for themselves and guests to use the lake shore for bathing, boating or kindred purposes.

4. The purpose, as set forth in the application, is to provide a pier for "fishing, docking and mooring of boats. . ." and to ensure compliance with the Americans With Disabilities Act. As noted, some portion of the 30 slips would be made available to the public for seasonal rental and some would be available for transient boaters, including Dockside patrons. The swimming area would be made available to O-Ton-Kah Subdivision residents.

5. The proposed 30-slip piers would create an additional burden on an already congested bay area. The proposed 140 foot long south pier extends into the water very near a channel culvert-opening that provides access to the lake in very close quarters. Further, as Nesta noted, there are numerous moorings and boatlifts along the channel. Under these circumstances, the two 140 long piers could create a hazard to navigation by adding to the congestion and reducing space for navigation on already-tight quarters. The applicant has not carried its burden of proving that the proposed structures would not materially obstruct existing navigation on Lake Beulah.

6. Where a public street borders upon a navigable waterway, there is no zone of private riparian right between the street and the public waters. The riparian rights incident to the land in that instance belong to the public roadway. Village of Pewaukee v. Savoy, 103 Wis. 271, 278-279 (1899) See: Heise v. Village of Pewaukee, 92 Wis. 2d 333, 344-345, 285 N.W. 2d 859 (1979)

In the proposed project area, there is a public right-of-way which intersects with Lake Beulah in the north parcel owned by Shore Drive Partnership at the approximate area where the proposed north pier is to be placed. (Nesta, Ex. 24) This is also very close to where the existing north pier was moored in the 1997 boating season. The Town of East Troy (the Town), not the applicant, would be the holder of riparian rights along the intersection of the three-rod easement and the Lake. As shown on a 1991 survey, the right-of-way is 24.75 feet wide. (Ex. 24) The right-of-way intersects with the lake less than 10 feet north of the proposed south, shared pier. According to the survey, the entire north 32 foot parcel owned by the Partnership is within the area of the Town right-of-way, which would intersect with Lake Beulah along the entire length of the north parcel. Of the 112 total feet of riparian frontage owned by the applicant, approximately half is encumbered by the public road right of way. (Nesta) In the vicinity of the proposed southern pier, there is an area of riparian land owned by the partnership between the right-of-way and the lake. The Town has not vacated its right-of-way and objects to the proposed placement of piers as found in the application. (Ex. 31) Accordingly, the proposed north pier may not be placed by the Partnership because it does not have unencumbered riparian ownership of the north 32 feet of its parcel.

7. The proposed pier structures do not comport with applicable Town of East Troy Ordinances. (Exs. 31 and 33) Specifically, the piers exceed sec. 12.01(2) which limits any individual riparian to no more than ten mooring spaces and does not allow for mooring of boats within less than 50 feet of the proposed swimming area. The Town also objected that piers 140 foot long would obstruct navigation given the congestion at the site and especially the channel and culvert opening near the proposed south pier. (Ex. 31) The DNR's policy is to permit piers that comply with Town Ordinances, wherever possible. (Nesta).

8. The proposed piers exceed the reasonable use of the two small parcels owned by the Partnership. (Nesta) The DNR has established a program guidance to aid field staff in determining the "reasonable use" of a riparian tract. (Ex. 28) According to Ms. Nesta, the DNR Area Water Management Specialist, the threshold referenced in the guidance document would indicate that this small riparian parcel would ordinarily be entitled to no more than 4 slips. Given the provision of public seasonal rental moor slips, and other factors, including the Town Ordinance, Nesta opined that any pier configuration which involved a placement of more than 10 pier slips would exceed a reasonable use of this small riparian tract. If the Partnership did not make slips available for public rental, Nesta opined, four slips would be a "reasonable use" of this riparian zone.

The proposed placement of 30 slips far exceeds the reasonable use of even 112 feet of riparian frontage. As indicated above, given the public road right-of-way, the northern 32 foot parcel does not possess any riparian ownership rights. Under these circumstances, the ten slips suggested by Ms. Nesta appears to be the absolute outer limits of a reasonable use of this site. As noted, ten slips would only be appropriate if six or more were made available to the public for seasonal rental. Because the Partnership would be providing a public benefit by making boat rental slips available to public, the project would be allowed up to ten slips as a marina facility. This comports with the DNR's policy as articulated in its program Guidance. (Nesta; Ex. 28, p. 4)

9. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if they should be found in the public interest to do so.

10. The proposed structures will not reduce the effective flood flow capacity of Lake Beulah upon compliance with the conditions in the permit.

11. The proposed structures will not adversely affect water quality nor will they increase water pollution in Lake Beulah. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats.

12. The proposed pier structures would interfere with efforts of the Lake Beulah Management District (the District) to eradicate the exotic Eurasian water milfoil, which grows rapidly and inhibits growth of more desirable native plant species. (Ex. 43) The District is a statutorily authorized Public Inland Lake Protection and Rehabilitation District. The District has developed a comprehensive Aquatic Plant Management Plan for Lake Beulah, which identifies Eurasian water milfoil control as a priority. (Id.)

The District presented substantial evidence that the two proposed 140 foot pier configurations would likely lead to difficulties in Eurasian milfoil control efforts because: a). it would be logistically difficult for the District-contracted harvester to access the near shore area if the two piers were configured as proposed; and b). because fragmentation of the exotic plant by boats in unharvestable areas would accelerate growth of the Eurasian milfoil in unharvestable areas. (Bindrim, Kreinbrink)

13. Because the pier proposal must be denied, it is not necessary to determine the effect of the Association easement rights on placement of the proposed piers. Nesta opined that a single 10-slip pier would not violate the terms of the easement because it would continue to allow for use of the near-shore area for "boating, bathing and kindred purposes." Ultimately, it is not the role of the DNR or the Division to interpret the easement and allocate the rights between the parties. Nor is it the Department's job to re-draft an acceptable pier placement plan. Rather, the DNR and the Division must review a specific permit plan to determine if statutory standards for placement of a structure on the bed of a navigable water have been met. In the instant action, the applicant has not carried its burden of proving compliance with the provisions of sec. 30.12, Stats.

14. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

## DISCUSSION

This case has a long procedural history, which includes a decision of the Wisconsin Supreme Court. Stoesser, et al. v. Shore Drive Partnership, 172 Wis. 2d 660, 494 N.W.2d 204 (1992).

Shore Drive Partnership owns the riparian frontage at the project site, but the O-Ton-Kah Park Property Owners Association (the Association) has an easement record in 1939 which reserves it the right to an 80 foot area on the southern end for "... bathing, boating or kindred

purposes." In 1989 and 1990 the Association, representing the owners of a backlot subdivision, first sought to place a pier at the site. The pier was removed by Shore Drive, and the Association sought a declaratory judgment in Walworth County Circuit Court. Shore Drive Partnership moved for Summary Judgment, which was granted. The Wisconsin Court of Appeals certified the issue to the Wisconsin Supreme Court. The Supreme Court reversed the grant of Summary Judgment, and held that riparian rights can be conveyed by easement to non-riparian owners. The Wisconsin Court held that the easement did not grant the Association "riparian owner" status, but that "...the intent of the parties was that the subdivision owners have access to Lake Beulah by way of the partnership's property. The easement is valid and reserved for the subdivision owners the right of access to Lake Beulah." Stoesser, at p. 209.

Shore Drive Partnership originally filed a pier permit application with the DNR on June 3, 1992. The Department withheld processing of the application until resolution of the Stoesser, et al., case. On April 8, 1996, after the decision in Stoesser, et al., the Partnership submitted a new application for a permit. (Ex. 7) The unsigned permit application was signed by the applicant at the August 25, 1997, hearing on this matter.

The proposal that was the subject of this hearing was that set forth in Exhibit 7. The proposal involves placement of two 140 foot piers, accommodating 30 boat slips, and provision for a roped swim area to accommodate lake users, including Subdivision residents.

After the Hearing Notice referencing the proposed two 140 foot-long piers was published, a seven-hour long hearing on the proposal was conducted on August 25, 1997. Numerous parties appeared and presented evidence on the proposal as noticed. However, after the hearing the Partnership submitted a brief which did not advocate on behalf of the project proposal, but which instead sought to drastically amend the permit application to limit the two piers to what had been placed during the 1997 boating season.

As reflected in the above Findings, there were numerous worthy objections to the 30 slip proposal that were raised at the time of the hearing. The DNR, O-Ton-Kah Park and Lake Beulah Management District all submitted post-hearing briefs which strenuously objected to consideration of any proposal other than that which was noticed to the parties and to members of the public (as owners of public trust waters) through the Notice publication in accordance with sec. 30.02, Stats. O-Ton-Kah argues that Shore Drive is "...now attempting to reconfigure the pier in a fashion that was not noticed before the hearing and only requested after the hearing was over. . ." and urged that the revised application be "...rejected as a denial of the parties' and potential objectors due process rights." (Association reply brief at p. 1) Similarly, the DNR argues that "...given the 'eleventh hour' modification by the Partnership, the general public has not been given the opportunity to comment on the amended proposal and it cannot be assumed that no objections exist." (DNR response brief at p. 7) Further, Lake Beulah Management District argues as follows: "The public hearing dealt with the application filed by the Shore Drive Partnership. No opportunity was previously provided to object to the amendment which occurred after the public hearing. Any post-hearing amendment runs contrary to the basic concept of a public hearing. This Shore Drive Partnership argument should fail on the basis of fundamental fairness." (Lake Beulah Management District brief at p. 5)

The ALJ accepts the reasoning of all of these parties that it would violate fundamental fairness to rule on an application which opposing parties have not an opportunity to consider or

to present evidence relative to their position. To consider a drastically different application would defeat the Notice requirements of sec. 30.02, Stats. Finally, the law is clear that procedural due process is violated when the scope of a Chapter 227 hearing exceeds the scope of a hearing as noticed. Bracegirdle v. Board of Nursing, 159 Wis. 2d 402, 420, 464 N.W. 2d 111 (Wis. Ct. App. 1990)

Further, there is ample evidence in the record that the existing, 1997 boating-season pier configuration would not be permitted in any event. Under such a proposal, the north pier would remain placed in the area intersected by the Town right-of-way. The existing pier configuration, would continue to violate the "reasonable use" of the site, because it involves placement of two piers accommodating more than 10 boats. Further, the rights of the easement holders would also be impacted.

After all of the litigation over this small patch of riparian frontage, it is frustrating not to provide "finality" in terms of sorting through the competing interests and rights of the parties. The proposed plan was very poorly-conceived. Numerous objections were essentially rebutted in the record. Instead of advocating its position, the Partnership attempted to do an "end-run" around the hearing process by drastically changing its plan after the evidence was in. It would be unfair to the other parties to do so.

Any permit issued by the Department should limit the Partnership to one pier with no more than 10 boats, six of which are made available to the public for seasonal rental. There is no such plan before the Division. Any plan in the future must consider the interests of all the parties.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.

2. The applicants are riparian owners within the meaning of sec. 30.12, Stats.

3. Every right which a riparian owner acquires, as such, to the waters by his land, is restricted always to that which is a reasonable use, and these terms are to be measured and determined by the extent and capacity of the lake, the uses to which it has been put, and the rights that other riparian owners on the same lake also have. Sterlingworth Condominium Ass'n v. DNR, 205 Wis. 2d 702, 716, 556 N.W.2d 79 (Wis. Ct. App. 1996).

The DNR has prepared a program Guidance document to aid field staff in making "reasonable use" determinations. The guidelines illustrate the DNR's experience and expertise in regulating piers under sec. 30.12, Stats. Id., p. 723. The guide sets a presumption of "reasonable use" at two spaces at a pier for the first fifty feet or lesser amount of shoreline and one more space for each additional fifty feet of shoreline in common ownership. However, DNR employees are to consider other criteria in determining the "reasonable use" of a riparian tract. Id., p. 722-723. The proposed placement of two piers accommodating 30 boats exceeds the "reasonable use" of 112 feet of riparian frontage.

4. Where a public street borders upon a navigable waterway, there is no zone of private riparian right between the street and the public waters. The riparian rights incident to the land in that instance belong to the public roadway. Village of Pewaukee v. Savoy, 103 Wis. 271, 278-279 (1899) See: Heise v. Village of Pewaukee, 92 Wis. 2d 333, 344-345, 285 N.W. 2d 859 (1979). Approximately the north half of the partnership's two parcels are within a Town right of way area.

5. The proposed facilities described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.

6. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

#### ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the permit application be DENIED, for the reasons set forth above.

Dated at Madison, Wisconsin on November 21, 1997.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705-5400  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

By:



JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE



## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision

1 Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs 227.52 and 227.53, Stats.

2 Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3 Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.